IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 227

CORINTH PUBLICATION, INC.,

Petitioner

v.

JAMES P. WESBERRY, HUBERT L. DYAR and MARCUS CALHOUN, as Members of the Georgia State Literature Commission,

Respondents

BRIEF OF RESPONDENTS

Pursuant to an Order of this Court requesting that the Attorney General of Georgia file a brief in response to Petitioner's Writ of Certiorari, Respondents now file their brief in opposition to the Petition for Writ of Certiorari.

I.

STATEMENT OF CASE

Respondents adopt Petitioner's statement of the case as being sufficient to present the questions before this Court. However, Respondents believe that a complete

review of the record in this case would enable this Court to better judge the trial proceedings in this case.

II.

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONSTITUTIONAL GUARANTY OR STATUTORY REQUIREMENT OF A JURY TRIAL IN THIS ACTION.

The Petitioner cites numerous provisions of both the Georgia and United States Constitutions as substantiating its contention that there exists a constitutional mandate of a jury trial in civil obscenity actions. The Respondents submit that each and every provision is inapplicable.

While the Respondents subscribe wholeheartedly to the coveted concept of trial by jury, we submit that it is well-established that a jury determination does not provide a patented formula for unerring justice, and is not to be required in all cases.

Article I, Section I, Paragraph XV of the Georgia Constitution sets forth the guaranty of freedoms of speech and press but states that the individual is responsible for the abuse of that liberty. We recognize this as one of our most valued freedoms, but submit that obscenity is an abuse of this cherished liberty and in any event it guarantees no right to jury trial and can rise no higher than the express guaranty found in Article VI, Section XVI, Paragraph I of the Constitution of the State of Georgia:

"The right of trial by jury, except where it is

> otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury except in the superior court."

Therefore, if the above constitutional provision contains no right to jury trial, reliance may not be placed in the Constitution for the Petitioner's contentions.

One of the earliest, and still the most incisive and authoritative explanations of the right to jury determination is found in *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848) in which the Court held at 207-208:

> "The provision in our State Constitution, that trial by jury, as heretofore used, shall remain inviolate, means that it shall not be taken away, as it existed in 1798, when the instrument was adopted, *and not that there must be a jury in all cases.*" (Court's emphasis).

The rational of this holding in a civil case was strongly stated at 206:

> "And while it is undoubtedly true, that the provisions, both of the National and State Constitutions, respecting this institution, apply to *civil cases*, still it cannot be denied, that they were mainly and primarily intended to protect inviolate, the trial by jury, in *criminal prosecutions*. And courts will watch with more jealousy, any departure from, or trespass upon trial by jury in the *latter* class of cases, than the *former*." (Court's emphasis).

The Respondents are unaware of any comparable common law action which would bring the present case

within the ambit of the constitutional guaranty and submits the burden was upon the Petitioner to point out a common law basis if one existed.

As an added safeguard, it was provided also in *Flint River Steamboat Co. v. Foster, supra* at 208:

> "An act which merely authorizes a judgment to be rendered, without the intervention of a jury, is not on that account unconstitutional; *more especially, where it guarantees this right ultimately, as in this case.*" (emphasis added).

It is the contention of the Respondents that jury trial is *ultimately* guaranteed in this type proceeding as the declaratory judgment action is merely an incident to eventual criminal proceedings.

If the standard to be applied were of a local community, the Respondents could possible accept the Petitioners constitutional argument for guaranteeing a jury trial. However, it was held in *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) that the "community" referred to in *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 was the "national community." It would be legal nonsense to attribute to a jury the sophistication necessary to recognize and apply "national standards." In addition, it is the contention of the Respondents that the determination of "obscenity" is not in reality a factual determination but rather a determination made possible only by close scrutiny of court decisions by one skilled in reading and interpreting such decisions. It is only in this way that "national community" standards can be ascertained. In summary, we submit that we are dealing with a hybrid, factual-legal question which partakes mostly of legal, ingre-

dients. A jury functions best when it deals with the resolution of disputed tangible facts and intangible facts and motivations inherent in every member of our society. This is not such a case.

In *Kingsley Books v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957), this Court had before it the question whether the defendant in a New York injunctive action was constitutionally entitled to a trial by jury. In preliminary remarks, the court observed that New York had both a criminal statute and an injunctive proceeding both designed to restrict the distribution of obscene publications and while the injunctive proceeding was much more lenient in that the injunction served as a warning before imprisonment, the court could not even hold that direct proceedings under the criminal statute required a jury trial. As this Court stated:

> "Of course, the Due Process Clause does not subject the States to the necessity of having trial by jury in misdemeanor prosecution."

This Court then observed that a judicial condemnation for obscenity under the injunctive proceeding is certainly less restrictive of freedom of expression than a conviction for a misdemeanor. It is obvious that the Georgia Declaratory judgment proceeding is even less restrictive than the New York injunctive proceeding in that no criminal sanctions are imposed automatically upon continuing the sale of the particular publication.

Ga. L. 1964, pp. 161-165, provides for the institution of declaratory judgment actions by the State Literature Commission to determine whether a book be obscene. The act is absolutely devoid of any reference to

jury trial. Therefore, it is necessary to examine the act with a view to ascertaining the legislative intent.

The Commission, after determining any publication to be obscene, may institute action for a restraining order or injunction (*Ga. L. 1958*, p. 393), or it may institute a declaratory judgment action (*Ga. L. 1964*, p. 161), each of the above procedures seeking the same result — an adjudication that the particular literature is obscene. Since there is a statutory provision for a jury trial in actions for permanent injunction and since criminal sanctions can accrue without further hearing as the question of obscenity upon failure to comply with the injunction it would appear reasonable to presume that the new declaratory judgment provisions were intended to place a buffer between outright criminal proceedings and factually final civil proceedings.

It is apparent that another principal legislative purpose in enacting the above-stated civil action was to provide a speedy adjudication of first impression on the obscenity of the particular publication in order to supply the necessary element of scienter (*Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205) in any subsequent criminal actions brought for selling obscene literature (*Ga. Code Ann.* Section 26-6301). Thus, it can be seen that the declaratory judgment action is an added precaution designed to fully protect the seller from criminal prosecution or imprisonment for contempt without prior notice that the literature is obscene and to warn him to cease and desist its sale. As such, the declaratory judgment proceeding is in reality a preliminary step in a criminal proceeding comparable in many ways to a "preliminary hearing" with the added advantage that the offender can purge himself of liability even

after the first adjudication. It will be noted that an individual is not denied a jury trial on the question of the obscene nature of the publication as he is entitled to a jury in any criminal action brought against him. In effect, the law is dealing with an area increasingly complicated by numerous federal court decisions, and represents a valiant attempt to eliminate the necessity of a distributor submitting every dubious piece of literature to an attorney for examination prior to placing it on his bookshelves for sale. The declaratory proceeding is designed to provide a speedy and harmless adjudication of the obscene nature of publications and the imposition of a requirement of jury would hinder the effectiveness of the proceeding and, at the same time, offer no meaningful advantage to either party.

This Court has implied that a jury of laymen is not qualified to decide the issue of obscenity by holding that the question of obscenity constitutes a "constitutional fact" which must be decided de novo by the appellate courts through all levels of appeal. *Jacobellis v. Ohio, supra.*

Therefore, the Respondents submit that it is difficult to imagine the Legislature insisting upon not one, but two, inconsequential jury determinations of fact which must be disregarded by each and every appellate court (State and Federal) which reviews the case.

It is provided that the complaint with exhibits shall be presented to the Superior Court for a determination of probable cause. (*Ga. L. 1964*, p. 162). "If the Court finds probable cause to believe such literature is obscene, it shall enter an order setting the matter down for special hearing at a date not less than twenty (20) nor more than twenty-five (25) days after its service . . .;

provided, however, if the respondents shall fail to file with the court a notice of intention to defend such action ten (10) days after having been served with a copy of the complaint, the court shall be at liberty to proceed with the appropriate action to declare such literature as obscene." (*Ga. L. 1964*, pp. 162-163). "If no answer or other defense is filed on or before the return date specified in the order, the court may forthwith determine whether the literature is obscene and enter an appropriate judgment. Upon expiration of the time for filing answers and other defenses, the court may, upon its own motion, or upon the application of any party, set a date for the trial of the issue joined, said date being at least twenty (20) days but not more than twenty-five (25) days from the date of service of the complaint." (*Ga. L. 1964*, p. 164).

Nowhere in this very detailed procedure is a jury trial directed but rather the time limitations pertaining to the trial of the case inveigh against the application of established procedure for placing a matter before a jury. In short, it is our contention that this is "declaratory judgment" in the descriptive sense and therefore does not compel the application of rules of "The Declaratory Judgment Act."

In our research, we have found few obscenity cases in which the question of the right to jury trial was put in issue, but in every case in which the question was adjudicated, the court found that there was no right to a trial by jury.

In *State of Kansas v. A. Quantity of Books*, 191 Kansas 13, 379 P. 2d 254 (1963), reversed on other grounds 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809, the Kansas Supreme Court held:

> "The present case is not a criminal case but a civil case. The appellants are claiming that they had a right to a jury trial. If that were true, appellants would have to point out what form of action at common law formed the basis for the present suit. Both the provision in Section 5 of the Bill of Rights of the state constitution which reads: 'The right of trial by jury shall be inviolate' and Amendment VII of the federal constitution preserve only the right of trial by jury as it existed at common law. This action grows out of a statute, and we know of no basis for it at common law. Therefore, there was no right to a jury trial."

Our neighboring state of Florida provides for a declaratory judgment proceeding similar to Georgia's prior to the institution of criminal proceedings and in *Rachleff v. Mahon,* 124 So. 2d 878 (Fla. 1960) it was argued that the trial of the case by the judge without a jury was a denial of due process. The Court held at 881:

> "We brush this argument aside with the observation that we know of no constitutional or statutory requirement of jury trial in this kind of declaratory decree proceeding, and have not been cited any by appellant. Jury trial of issues under the Declaratory Decree Statute is permissive, but not mandatory, in certain instances."

See also *Gerstein v. Pleasure Was My Business,* 136 So. 2d 8 (1962).

In conclusion Respondents assert that there is no right to a jury trial under this type of proceeding.

2. THE LOWER COURT PROPERLY FOUND THE PUBLICATION *SIN WHISPER* TO BE OBSCENE.

The standards to be applied in determining whether a particular publication is obscene are numerous and increase with each new decision of the United States Supreme Court. It is the position of the Petitioner that each of the standards are mutually exclusive, and that if it can prove compliance with one criterion, the publication cannot be adjudged obscene.

The Respondents submit that the Court need consider only two of the established standards for purposes of this argument although most assuredly all standards are to be applied in the final determination. We make this statement because, although some attempt was made to establish a "social value" of the book, the principal defense was on the grounds that it "did not go beyond the customary limits of candor." *Jacobellis v. Ohio, supra.*

Although the Respondents freely admitted at trial that there were books on the newsstands which were as explicit as *Sin Whisper* in their treatment of sex and indeed more explicit in their use of vulgarities, the Petitioner dwelled at length on reading particularly graphic passages from other publications into the record. The Respondents maintain that this reliance is misplaced and without merit.

We call the Court's attention to two standards: (1) "goes substantially beyond the customary limits of candor" *Jacobellis v. Ohio, supra;* and (2) "utterly without redeeming social value" *Roth v. United States, supra.*

It is the position of the Respondents that many of the

passages read into the record by the Petitioner *do* go beyond the customary limits of candor. We submit that this Court would have found this to be true in such works as *Tropic of Cancer* if the passages stand alone, but it is well-established that the work must be considered as a whole (*Roth v. United States, supra*) and when this is done, it is often found that although certain passages go "beyond the customary limits of candor," they have "*redeeming* social value." Something must be basically inexcusable to be "redeemed." The word is defined in *Webster's New International Dictionary* (2nd Ed., 1934) as "to make amends for; to offset; to atone for; to compensate; as, to redeem an error."

We agree that the Court is not allowed to "weigh" social value against obscene passages. It is a contention that the book *Sin Whisper* is "*utterly without* redeeming social value," and therefore, provides no justification for its blatant appeal to prurient interests.

Our contention is not unique as a United States District Court held in *Grove Press, Inc. v. Christenberry,* 175 F. Supp. 488 (D.C. S.D. N.Y., 1959), Aff'd. 276 F. 2d 433 (2nd Cir., 1960):

> "To be obscene, dominant effect of a book must be an appeal to prurient interest, that is, shameful or morbid interest in sex, and such theme must so predominate that any ideas of redeeming social importance contained by the publication are submerged."

This Court went further than our present position and held that although you do not weigh social value against obscenity, a book can make some feeble attempt at a moral, story, or philosophy, and yet have this substance totally overcome by the obscenities contained

therein. We submit this is a realistic view if we are not to approach the position that a hard core pornographer can publish a book with a two-page introductory chapter stating that the hero or heroine is frustrated and resolves to seek release in sexual experiences; followed by two hundred pages of description of varied and vivid sexual encounters; and concluded by a page stating that "sex doesn't pay."

In short, a book may have a number of vivid and detailed passages dealing with sex, nudity, or excretion and still not be obscene because of the overall literary value of the book. However, we submit that it is erroneous to contend that a particular passage or passages within an otherwise literary work establish the limits of candor for all publications and that another publication without visible or ascertainable literary value may link together a number of such passages and say that it has not gone beyond the limits of candor because a passage in another book is more vivid. In other words, we submit that there is a minimum of literary content that a book dealing almost exclusively with descriptions of sexual activity must possess in order to extricate itself from obscenity.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day, by the United States mail, properly addressed, postage prepaid, served a copy of the within and foregoing brief on the Attorney for the Petitioner, Stanley Fleishman, 1680 Vine Street, Suite 700, Los Angeles, California 90028.

This _____ day of _____, 1966.

HARDAWAY YOUNG, III
Attorney

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

CORINTH PUBLICATIONS, INC. *v.*
WESBERRY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 227. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Georgia is reversed.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.